

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-140082
	:	TRIAL NO. B-1106572
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
WILLIAM FEARS,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant William Fears appeals from the Hamilton County Common Pleas Court's judgment denying his Crim.R. 33 motion for a new trial. We affirm the court's judgment.

Fears was convicted in 2012 on eight counts of telecommunications fraud and a single count of theft. He unsuccessfully challenged his convictions in an appeal to this court and in an array of postconviction motions. *See State v. Fears*, 1st Dist. Hamilton No. C-120585 (May 24, 2013).

In this appeal from the overruling of his 2013 motion for a new trial, Fears advances three assignments of error that essentially restate the claims presented in his motion. We address together, and overrule, the assignments of error, because Fears failed to demonstrate that he was entitled to leave to move for a new trial out of time.

Fears sought a new trial on grounds of actual innocence, prosecutorial misconduct, insufficient evidence, and inadmissible evidence. *See* Crim.R. 33(A)(1), (2), (4), and (5).

A motion for a new trial on grounds other than newly discovered evidence must be filed either within 14 days of the return of the verdict or within seven days after leave to file a new-trial motion has been granted. Crim.R. 33(B).

Fears did not seek leave under Crim.R. 33(B) before filing his new-trial motion. But to the extent that he sought in his new-trial motion to justify his filing delay, the motion may fairly be read to seek both a new trial and leave to file a new-trial motion out of time.

In seeking leave, Fears bore the burden of proving by clear and convincing evidence that he had been “unavoidably prevented” from timely filing his new-trial motion. Crim.R. 33(B). The common pleas court concluded that Fears had failed to sustain that burden. Because the record before us is devoid of any evidence that might be said to demonstrate unavoidable prevention, we may not substitute our judgment for that of the common pleas court. *See State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990). *Accord State v. Hawkins*, 1st Dist. Hamilton No. C-110291, 2011-Ohio-5645, ¶ 14.

Accordingly, we affirm the court’s judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., FISCHER and DEWINE, JJ.

To the clerk:

Enter upon the journal of the court on September 5, 2014

per order of the court _____.
Presiding Judge